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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PFS CORPORATION, Petitioner

v.

KENNETH B. TURNER, and
CHARLOTTE TURNER, Respondents

On Petition For Writ Of Certiorari
To The Supreme Court Of Alabama
No. 1931169

BRIEF OF THE MANUFACTURED HOUSING INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CITATION TO THE OPINION OF THE SUPREME COURT OF ALABAMA

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The Manufactured Housing Institute submits this brief as amicus curiae, and respectfully suggests that this Court grant the Petition, and reverse the decision below.[1]

STATEMENT OF INTEREST

The amicus Manufactured Housing Institute (MHI) is an Illinois not-for-profit corporation headquartered in Arlington, Virginia, which represents manufacturers, suppliers, retailers, lenders, community owners, state manufactured housing associations, and private third party inspection agencies nationwide--all segments of the manufactured housing industry. The Petitioner, PFS Corporation (PFS), is a member of MHI. MHI's home manufacturer members as of April, 1996, operated 170 of the 293 plants producing homes nationwide. MHI's membership produces approximately seventy percent (70%) of the total production of the industry.

MHI is submitting this Brief because of its concern for the adverse impact that the Alabama Supreme Court's ruling will have on the ability of the industry to continue to produce affordable housing. Because of the nationwide production and shipment of manufactured homes, it is vital to preserve the uniformity and consistency of the Federal standards to provide the nation's only non-subsidized affordable housing. MHI is able to provide this Court its broad industry and historical perspective, not provided in the Petitioner's brief. MHI, in existence since 1936, was involved in the development of a national industry standard and inspection system prior to the passage of the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA). 42 U.S.C. § 5401 et seq.

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[1] Both Petitioner and Respondent have consented to the filing of this brief of the Manufactured Housing Institute as amicus curiae, which consents are on file with the Court.

The Alabama Supreme Court's opinion requires each third party design agency to go beyond its current role of reviewing designs for compliance to the Federal manufactured housing standards issued and enforced by the U.S. Department of Housing and Urban Development (HUD) in contravention of the express preemption provision in the NMHCSSA. The opinion also goes against the intent of Congress as revealed by the NMHCSSA's legislative history and the regulatory framework for enforcing the standards promulgated and administered by HUD in 24 C.F.R. Part 3282.

MHI, on behalf of its members, believes that the maintenance and preservation of Federal preemption of the Federal standards and enforcement system is of vital importance to the entire industry and the nation's homebuyers. Such importance is revealed by the vast interstate nature of the industry. There are a total of 293 home manufacturing plants in 32 of the 50 states with homes being shipped to all 50 states.[2] In 1995, the industry produced 339,601 manufactured homes.[3] For 1995, the retail sales of the industry is estimated by MHI to be $12.3 billion dollars.[4] Homes are often produced in one state and sold and installed in another state pursuant to the preemptive Federal standards and enforcement system promulgated by HUD pursuant to the mandates of the NMHCSSA. This unique Federal program provides uniformity where chaos reigned prior to the passage of the NMHCSSA. This uniformity, provided by preemption for both the standards and the inspection system, is a key component in the affordability of manufactured homes. Unlike other forms of housing which must comply with the various differing local codes

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[2] Manufactured Housing Institute, Manufacturing Report, (Apr. 1996).

[3] Id.

[4] This is derived by multiplying the total 1995 shipments by the total average sales price of $36,300 per home.

and inspection systems, manufactured homes comply with only one code and inspection system.

MHI is particularly concerned that the Alabama Supreme Court in its opinion singles out a third-party inspection agency, licensed by HUD and only one component in the comprehensive Federal regulatory program, to permit review for compliance with a state tort claim, when this third party agent only has duty and responsibility under the NMHCSSA for reviewing the manufacturer's design to the Federal standards. The result of this ruling will be a serious undermining of the preemptive nature of the Federal regulatory program essential to the provision of quality, affordable homes manufactured throughout the nation. Such a result would completely thwart the express intent of Congress.

SUMMARY OF ARGUMENT

The Alabama Supreme Court's ruling undermines the express preemption provision of the National Manufactured Housing Construction and Safety Standards Act of 1974. The court erred in its application of the law by failing to rule that the relief demanded by the Respondent would effectively establish a state standard in direct contravention to the intent of Congress.

After a long history of industry standards for manufactured housing, Congress established an expressly preemptive statute to provide uniformity. The Federal standards adopted by the Department of Housing and Urban Development are performance-based, and are enforced through an extensive regulatory system of review, inspection and oversight. The preemptive nature of the NMHCSSA was no accident, but rather a concerted effort on the part of Congress to ensure that Federal standards would be paramount in manufactured housing. The role of the DAPIA was explicitly defined in the NMHCSSA and does not allow for deviation from prescribed Federal standards.

The Alabama Supreme Court misapplied case law and the provisions of the NMHCSSA in its ruling. The express preemption provision dictates that no standard other than the Federal standard can be enforced for manufactured housing. State tort claims cannot be allowed to circumvent the intent of Congress by usurping the preemptive nature of the Federal standards. Furthermore, the savings clause does not exempt state tort claims from preemption, and it does not apply to DAPIAs.

The Alabama Supreme Court's ruling thwarts the establishment of uniform Federal standards and a uniform inspection system for manufactured housing. The U.S. Supreme Court should look to its prior rulings that recognize the importance of upholding Congress' intent of maintaining uniformity in similar situations. It should not let stand a ruling that adversely impacts the affordability of housing for low and moderate income families Congress explicitly intends to maintain.

ARGUMENT

I. THE ALABAMA SUPREME COURT'S FAILURE TO UPHOLD PREEMPTION UNDER THE NATIONAL MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS ACT SERIOUSLY UNDERMINES THE ENTIRE FEDERAL REGULATORY MANDATE.

The National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA) contains an express or explicit preemption provision, which establishes clear Congressional intent to establish Federal manufactured housing standards and an accompanying enforcement system that overrides state and local manufactured housing standards. 42 U.S.C. § 5403(d). Such an explicit provision is distinct from the other forms of preemption recognized under Federal law. The legislative history of the NMHCSSA and the regulatory framework adopted by the U.S. Department of Housing and Urban Development (HUD) to implement the NMHCSSA demonstrate both the reasons for adopting this Federal preemptive system and the importance of maintaining it. The Design Approval Primary Inspection Agencies (DAPIAs) approved by HUD, including PFS Corporation, are third party inspection agencies which are critical components of this Federal regulatory system. The Alabama Supreme Court's ruling requires such a third party inspection agency to establish a standard different from the Federal standard and undermines the entire Federal preemptive regulatory system.

A. Congress Provided for Express Preemption of State Law in the NMHCSSA.

Federal law may preempt state law (1) when Congress explicitly defines the extent to which it intends to preempt state law; (2) when Congress indicates an intent to occupy an entire field of regulation; and (3) when state law conflicts with federal law and compliance with both is impossible. Michigan Canners & Freezers Ass'n v. Agric. Mktg. and Bargaining Bd., 467 U.S. 461, 469

(1984). Implied conflict preemption has been found where it is "impossible for a private party to comply with both state and federal requirements," English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52 (1941); Freightliner Corp. v. Myrick, 115 S. Ct. 1483, 1487 (1995).

In the National Manufactured Housing Construction and Safety Standards Act of 1974, Congress set forth its express intention for the Federal standards to preempt state and local law. Section 5403(d) of 42 U.S.C. provides:

> Whenever a Federal manufactured home construction or safety standard established under this chapter is in effect, no state or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction or safety standard.

For Congress to expressly preempt state and local law as it has in the NMHCSSA is unusual, and must be interpreted as a strong indication of Congressional intent to establish a single, Federal standard. The preemption language of the NMHCSSA is modelled after similar language in the National Traffic and Motor Vehicle Safety Act of 1966. In both of these cases, because of the particular interstate commerce concerns for automobiles and manufactured homes, Congress saw the need for Federal preemptive standards to provide for uniformity and rejected weaker, less restrictive options. For example, the original House version of the NMHCSSA, introduced in 1972, contained a much less comprehensive preemption clause. The House bill would have allowed state or local codes to be equal to or more stringent than the Federal standards. Senator Brock introduced similar legislation

in the Senate that required state or local codes to be only equal to the Federal code, and in 1973 Senator Proxmire introduced a bill that would have permitted states to adopt higher standards than the Federal code. However, the final Senate version prohibited state and local standards that were not identical to the Federal standards, but allowed state handling of any issue for which there was no Federal standard. See Committee on Housing and Urban Affairs, S. Doc. No. 1348, 93d Cong., 1st Sess. 1221-22 (1973). In recognition of the less mobile nature of modern factory-built homes, Congress changed the name of the mobile home to manufactured home in the NMHCSSA in 1980. National Commission on Manufactured Housing, Final Report 19-20 (Aug. 1, 1994).

To recognize the importance of preemption to the regulation of manufactured housing, a brief overview of the history of this regulation prior to the passage of the NMHCSSA is useful. The manufactured housing industry's origins date back to the factory-assembled travel trailers of the 1920's. Safety standards for manufactured homes did not exist in the earliest years. By the 1950's, some municipalities imposed local code requirements on manufactured homes either to improve their quality or to ban them outright. This led the industry to develop its own standards. By 1963, a standard was published by the American National Standards Institute (ANSI) in association with the manufactured housing industry and the National Fire Protection Association (NFPA). In 1969, this standard - ANSI A119.1 for Mobile Homes - Body and Frame Design and Construction: Installation of Plumbing, Heating, and Electrical Systems - was expanded to include body and frame construction provisions. Arthur D. Bernhardt, Building Tomorrow. The Mobile/Manufactured Housing Industry 377 (1980).

Amicus Manufactured Housing Institute, formerly the Mobile Home Manufacturers Association (MHMA), required its members to comply with ANSI A119.1, and had inspectors conducting in-plant inspections. The Amicus also encouraged states to recognize and adopt ANSI A119.1. Final Report at 19. By 1974, 45 states had adopted some version of the ANSI standards.

However, there was a wide variance in these state standards. Besides the lack of uniformity in the state standards, there was also a vast difference in the state enforcement programs. Some states, like California and North Carolina, had effective enforcement programs while some had no inspection or enforcement mechanism (e.g., Louisiana, Michigan, Missouri, Montana, Nebraska, New Hampshire, Oklahoma and West Virginia). Id. As pointed out by the National Manufactured Housing Commission:

> State-by-State variations made it difficult for the industry to build homes that were uniform and prevented full interstate reciprocity. Multiple inspections of the same unit raised costs, and in up to 10 states no regulations at all governed manufactured home construction. Id.

In the early 1970's consumer organizations, particularly Ralph Nader's Center for Auto Safety, began to call for "stricter and more uniform" manufactured home standards. Id.

The National Manufactured Housing Construction and Safety Standards Act of 1974 mandated that the HUD Secretary adopt Federal preemptive standards that are "reasonable and shall meet the highest standards of protection, taking into account existing State and local laws relating to manufactured home safety and construction." 42 U.S.C. § 5403(a). HUD was also charged by Congress with establishing a Federal enforcement program to guarantee compliance.

The members of Amicus Manufactured Housing Institute looked to Federal preemption to provide a single set of construction standards by which to build homes anywhere in the U.S., so no different or more stringent requirements could be placed on them in different states. With such standards' uniformity, the cost of manufacturing is reduced, providing for more affordability to homebuyers. Federal preemption meant that the homes could be marketed nationwide. As outlined in Section 3280.1 of the Federal standards, the preemptive code, to the maximum extent possible, is

performance-based. The members of the Amicus view such a code as encouraging innovation and use of different materials and techniques, which also contribute to affordability.

The express preemption of state law in the NMHCSSA was created purposely by Congress to provide the uniformity requisite to nationwide delivery of affordable, safe and high quality manufactured homes. Allowing the Alabama Supreme Court ruling to stand will be detrimental to the uniformity dictated by Congress.

B. HUD Has Established A Preemptive Regulatory System Which Defines the DAPIA's Role.

In 1976, HUD promulgated Manufactured Home Procedural and Enforcement Regulations, 24 C.F.R. Part 3282. Section 3282.11 of these regulations provides for preemption and reciprocity of the Federal manufactured housing regulatory system.

Under this regulation:

> No State may require, as a condition of entry into or sale in the State, that a manufactured home which has been certified as in conformance with the Federal standards . . . be subjected to state inspection to determine compliance with any standard covering any aspect of the manufactured home covered by the Federal standard . . . . 24 C.F.R. § 3282.11(b).

Further, it provides that States may participate in the enforcement of the Federal standards as State Administrative Agencies (SAAs) or PIAs (Primary Inspection Agencies) or both, but:

> No State may establish or keep in effect through a building code enforcement system or otherwise, procedures or requirements which constitute systems for enforcement of the Federal standards or of identical State standards which are outside the

> system established in these regulations or which go beyond this system to require remedial actions which are not required by the Act and these regulations. 24 C.F.R. § 3282.11(c).

Finally, Paragraph (e) of this Section states:

> No State or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act. 24 C.F.R. § 3282.11(e).

The Federal manufactured housing program requires manufacturers to participate in an extensive system of design approvals and inspections to ensure that the homes being produced will conform to the Federal standards. In the preproduction phase of enforcement activities, the manufacturer hires a HUD-approved independent third-party DAPIA (which can be either a private or State agency) to review the manufacturer's design for conformance to the standards. A HUD-approved independent third-party Production Inspection Primary Inspection Agency (IPIA) is hired by the manufacturer to assist in ensuring that the homes constructed in the plant comply with the Federal standards. To assure enforcement in a uniform and consistent manner in all states and to provide the various states an opportunity to monitor the performance of the State and private inspection agencies, HUD has entered into a monitoring contract with the National Conference of States on Building Codes and Standards (NCSBCS). To evaluate the performance of HUD approved DAPIAs, NCSBCS reviews designs of manufacturers for compliance with the Federal standards. However, HUD remains the final administrative authority.

Under this system, each manufactured home is required to bear a permanent label in which the manufacturer certifies that the home is constructed in conformance with the Federal standards. 42 U.S.C. § 5415. The checks and balances of the enforcement system assure that the certifications are reliable.

The DAPIA's responsibility is to review the manufacturer's designs for conformance with the Federal standards. In order to maintain Federal uniformity, the DAPIA cannot require compliance with a different (stricter or looser) standard which it might choose to impose. This is not the DAPIA's duty as a third party inspection agency. In the Petitioner's case, the Alabama Supreme Court is requiring the DAPIA, a third party, to go beyond the established Federal standard. In fact, the design of the home, including its transportation system, was also reviewed by NCSBCS without it finding any failure to conform to the transportation standard at issue in this case. If this ruling is allowed to stand, each and every DAPIA could be forced to establish a different standard for every separate aspect of the manufactured housing construction and safety standards in every separate state. Such a proliferation of diverse standards would no longer be "standard" and would seriously thwart the intent of Congress in the passage of the NMHCSSA.

II. IT IS ESSENTIAL THAT THIS COURT GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE ALABAMA SUPREME COURT MISAPPLIED THE EXPRESS PREEMPTION PROVISION IN THE NATIONAL MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS ACT.

It is essential that this Court grant the Petition for a Writ of Certiorari because the Alabama Supreme Court misapplied the express preemption provision in the NMHCSSA. This provision operates to preempt state tort law claims against the Petitioner because those claims, if allowed, would establish a state standard different from the Federal standard. Furthermore, as explained herein, the savings clause in the NMHCSSA does not exempt from preemption state tort claims which relate to exactly the same issues addressed by the Federal standards, and regardless, cannot apply to the third party inspection agencies.

A. The Express Preemption Provision of the NMHCSSA Governs the Outcome of this Case.

Courts often begin with the assumption that Congress did not intend to displace state law. Preemption is an exception to this general rule. "The underlying rationale of the preemption doctrine . . . is that the Supremacy Clause invalidates state laws that interfere with, or are contrary to, the laws of Congress." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824)). Whether a Federal act will preempt a state act is a matter of Congressional intent. Gushke v. City of Oklahoma City, 763 F.2d 379, 383 (10th Cir. 1985). "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95 (1983) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). Where there is an express provision in the statute, the statutory provision will determine the scope of Federal preemption. "[I]n enacting federal law, Congress may explicitly define the

extent to which it intends to preempt state law." Michigan Canners, 467 U.S. at 469.

When Congress enacts an explicit provision on preemption and that provision supplies a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). Therefore, the express preemption provision in the NMHCSSA should be applied to determine the scope of Federal preemption in this case.

B. Section 5403(d) of the NMHCSSA Operates To Preempt Respondent's State Tort Law Claims as to the Petitioner.

The National Manufactured Housing Construction and Safety Standards Act contains an express preemption provision, which is a reliable indicium of congressional intent. Section 5403(d) prevents states and municipalities from establishing "any standard" regarding "construction or safety" when it deals with the "same aspect of performance" as the Federal standard. 42 U.S.C. § 5403(d). This comprehensive, express preemption is unusual, and therefore should be given great weight. "Such express preemptive language may be found on the face of a statute, in its legislative history, or in regulations promulgated pursuant to the law." Scurlock v. City of Lynn Haven, 858 F.2d 1521, 1523 (11th Cir. 1988). HUD's interpretation of preemption in the NMHCSSA as documented in the Manufactured Home Procedural and Enforcement Regulations provides a clear road map of the extent of and necessity for Federal preemption of the manufactured housing standards. Section 3282.11(e) provides:

> No state or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 24 C.F.R. § 3282.11(e).

A state rule may not be enforced if it impairs the "Federal superintendence of the manufactured home industry as established by the Act." Id.

In spite of these expressly preemptive provisions, the Alabama Supreme Court held that the Federal law did not preempt the Respondent's state tort law claims. The court rested this conclusion on its view that Alabama lacked state law standards regarding manufactured home construction and safety, and therefore the tort action did not establish any law in contradiction with the Federal act. Turner v. PFS Corp., 1995 WL 614102, *2 (Ala.).

The Alabama Supreme Court's holding fails to acknowledge the fact that the state establishes a different standard if it gives a state jury the ability to determine the appropriate actions which a design inspection agency reviewing the manufacturer's designs must take. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-7 (1959). In this case, the Alabama Supreme Court did not think that the Respondent's tort claims placed any greater requirements on PFS Corporation than the Federal standards. Turner, 1995 WL at *2. Respondent's claim that PFS was negligent because the manufacturer's brake system did not meet some arbitrary engineering standards is specious in that the brake system was approved in accordance with specific Federal standards. Therefore, if a jury in a state court was to find in favor of the Respondent, it would establish a variant state standard. As recognized even by the Alabama Supreme Court, "claims that impose different state standards are preempted." Id.

The Federal regulation provides standards for brake assemblies in manufactured homes. These standards are performance-based, meaning that they specify achievement of substantive results, rather than giving cookbook formats to follow. Section 3280.904(a) of 24 C.F.R. provides that "the transportation system . . . shall effectively respond to the control of the braking." Section 3280.904(b)(9)(i) states:

> The number, type, size, and design of brake assemblies required to assist the towing vehicle in providing effective control and stopping of the manufactured home shall be determined and documented by engineering analysis.
> 24 C.F.R. § 3280.904(b)(9)(i).

While this would at first glance seem to support the Respondent's position that the DAPIA was required to approve only those braking systems which have undergone engineering analysis, the last line in Section 3280.904(b)(9)(i) explicitly states, "[t]hose alternatives listed in Section 3280.903(c) may be accepted in place of such analysis." Section 3280.903(c) provides:

> In place of an engineering analysis, either of the following may be accepted: 1)Documented technical data of suitable highway tests which were conducted . . . ; or 2) acceptable documented evidence of actual transportation experience.
> 24 C.F.R. § 3280.903(c).

In 1976, soon after the promulgation of the Federal standard, HUD issued Interpretative Bulletin J-1-76 on transportation. This Interpretative Bulletin explained that "acceptable documented evidence" is the manufacturer's own certification of actual transportation experience.

According to Section 3280.903(c) and HUD's Interpretative Bulletin, the DAPIA may accept a letter from the manufacturer, certifying that the home's transportation system has not experienced failures exceeding 1% of the total number of units transported on that chassis, in place of an engineering analysis. The Respondent's tort claims allege that PFS Corporation negligently approved the manufacturer's braking design because having brakes on one axle failed to meet engineering standards. But the Federal regulations explicitly list acceptable documents that the DAPIA may receive (and which PFS received from the manufacturer) to approve a design. Therefore, the negligence action, which rests on requiring

engineering analysis, and requires more than the Federal standards promulgated pursuant to the statute, is necessarily preempted.

Holding PFS Corporation liable for negligence, when it has met the appropriate Federal standard, would establish a state standard which conflicts with the Federal standard, and is expressly disallowed by the NMHCSSA and its implementing regulations at 24 C.F.R. § 3282.11.

C. The Savings Clause Does Not Exempt Respondent's State Tort Claim from Preemption.

Section 5409(c) of the NMHCSSA provides a savings clause for state law, "[c]ompliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from liability under common law." 42 U.S.C. § 5409(c). The Alabama Supreme Court considered the savings clause a bar to preempting the state tort law action. But this clause must be interpreted in conjunction with the preemption provisions and Congress' intent.

Congress clearly intended with its preemptive language to prohibit the states from establishing safety standards independent from those contained in the NMHCSSA. Allowing the state courts to develop a different standard would exactly contradict the express preemption clause. In Cox v. Baltimore, 646 F. Supp. 761 (D. Md. 1986), a case involving the National Traffic and Motor Vehicle Safety Act (NTMVSA) containing a similar preemptive provision, the court explained that the savings clause could not be interpreted to negate the purpose of the expressly preemptive provisions:

> Reasonably read . . . the clear meaning of the clause is that compliance with the federal standards does not protect an automobile manufacturer from liability for design or manufacturing defects in connection with matters not covered by the federal standards. Id. at 764.

Even if this Court finds that the tort claims are not expressly preempted, the claims are preempted by implication. Though the court declined to call it "express" preemption, the court disallowed a tort action under the NTMVSA in Baird v. General Motors, Corp., 654 F. Supp. 28 (N.D. Ohio 1986), because it found that allowing the tort action against an automobile manufacturer would effectively reduce the options the Federal standard gave to the manufacturers. See also Pokorny v. Ford Motor Co., 902 F.2d 1116, 1123-25 (3d Cir. 1990). "[T]he intent of the regulatory scheme [was] to provide flexibility in the development of technologies to improve automotive safety." Baird, 654 F. Supp. at 32. The court in Baird found that in order for manufacturers to reduce their common law liability exposure, they would have to adhere to the most restrictive standard, in contradiction with the Federal standard allowing flexibility. Id.

In Freightliner Corp. v. Myrick, 115 S.Ct. 1483 (1995), this Court allowed the tort action in spite of a similar preemptive provision, where the statute contained a similar savings clause. However, the holding in Freightliner is entirely distinguishable from this case. Freightliner dealt with a Federal standard for trucks that had been suspended by court action and was not in effect. In the absence of an applicable Federal standard, the court correctly held that state tort law action was permissible. Turner is distinguishable, because clearly in this case an effective Federal standard exists.

Therefore, the savings clause does not exempt from preemption tort actions which relate to exactly the same issues addressed by the Federal standard. But the savings clause allows actions dealing with manufactured housing which are not directly addressed by the Federal statute to be resolved in state courts according to common law. Also, where the manufacturer provides a safety warranty, the manufacturer's private contracts may be enforced in state courts, because "a common law remedy for contractual commitment voluntarily undertaken should not be regarded as a 'requirement imposed under State law.'" American Airlines, Inc. v. Wolens, 115 S.Ct. 817, 824 (1995).

This Court has previously expressed displeasure with allowing tort actions which establish a different standard. The purpose of enacting preemptive legislation is to designate "areas of conduct which must be free from state regulation if national policy is to be left unhampered." San Diego Building Trades Council, 359 U.S. at 246-247. State regulation which interferes with Federal policy:

> [C]an be as effectively exerted through an award of damages as through some form of preventive relief . . . Even the States' salutary efforts to redress private wrongs . . . cannot be exerted to regulate activities that are potentially subject to the extensive federal regulatory scheme. Id.

In addition:

> A system under which each state could, through its courts, impose . . . its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress. Chicago & N.W. Transp. Co., 450 U.S. at 325.

In this case, the NMHCSSA expressly provides that a state does not have the authority "either to establish, or to continue in effect . . . any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home." 42 U.S.C. § 5403(d). Allowing a jury to determine reasonable manufactured home construction and safety standards would lead to establishment of a conflicting state standard. This "abrogates to a single jury the regulatory power explicitly denied to all fifty states." Fitzgerald v. Mallinckrodt, 681 F. Supp. 404, 407 (E.D. Mich. 1987). The tort standard, what a reasonable man would consider safe brakes, is not identical to the Federal standard, which provides a method of manufacturer compliance for the DAPIAs to review, permitting certification letters from the manufacturers. If there should be more stringent standards, then the Respondent

should petition HUD to retract or amend its Standard and Interpretative Bulletin.

Even if the Respondent's claim did not present evidence conflicting with the Federal standard, the Federal preemptive regulations disallow any alternative enforcement mechanism:

> No state may establish or keep in effect . . . procedures or requirements which constitute systems for enforcement of the Federal standards or of identical state standards, which are outside the system established in these regulations. 24 C.F.R. 3282.11(c).

This provision expressly disallows state enforcement of the Federal standards outside the system established by HUD. Therefore, the savings clause must be narrowly interpreted, or it would make the Federal preemptive provisions obsolete.

D. The Savings Clause Cannot Apply To DAPIAs Because DAPIAs Enforce the Standards, and Are Not Subject To Compliance With the Standards.

Even if this Court does not accept that state tort claims which establish a different state standard and enforcement mechanism are preempted, Respondent's tort claim against PFS is nevertheless preempted. The savings clause, which allows certain common law actions, does not apply to DAPIAs. The provision specifically applies to compliance with the manufactured housing construction and safety standards: "[c]ompliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from liability under common law." 42 U.S.C. § 5409(c). The DAPIA, unlike the manufacturer, is not an entity that must "comply" with the Federal standards, and therefore the savings clause does not apply to the DAPIA. The DAPIA is part of the enforcement arm of HUD. It merely acts as HUD's agent to ensure that a manufacturer's designs comply with the standards. The manufacturer bears responsibility

for non-compliance with Federal standards. HUD bears the responsibility for enacting effective safety standards.

III. CONCLUSION

The Alabama Supreme Court's ruling thwarts the intent of Congress to establish uniform Federal standards and a uniform inspection system for manufactured homes as defined by the NMHCSSA. The intent of Congress is expressly set forth in the NMHCSSA and further confirmed by its legislative history. As explained in the HUD Manufactured Home Procedural and Enforcement Regulations, the Federal regulatory system established by HUD expressly preempts state regulatory systems that operate outside the Federal system. 24 C.F.R. § 3282.11(c). The Petitioner, PFS, acted as a HUD inspection agent, known as a DAPIA, in reviewing the manufacturer's designs for compliance with the Federal standards. In this case, the DAPIA's responsibility was complete once it found compliance to the Federal standard.

The Alabama Supreme Court's ruling requires PFS, as a third party inspection agency, to establish a standard different from the Federal standard. The Alabama Supreme Court failed to adhere to its own holding that "claims that impose different state standards are preempted." Turner, 1995 WL at *2. The negligence action, that refused to recognize a specifically allowed alternative for compliance review by the DAPIA, demands more than the Federal standard. In order to maintain Federal uniformity, the DAPIA cannot enforce compliance with a different standard as this ruling would require. This would create diverse standards imposed by the various DAPIAs, seriously undermining the intent of Congress.

For the site-built housing industry, code or standards proliferation "has resulted in a complicated tangle of obsolete, costly, and time-consuming regulations." Building Tomorrow at 379. The Court of Appeals, in a case interpreting the preemption provision of the NMHCSSA, recognized that cost to the public was a specific concern of Congress in promulgating the NMHCSSA:

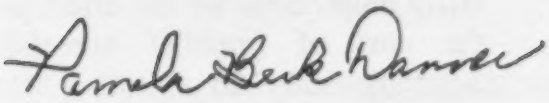
> [W]hile consumer protection represents the primary goal of the legislation, complete safety is not to be obtained at all expense: in promulgating regulations, HUD must "consider the effect of [the standards] on the cost of [mobile] home[s] to the public." Scurlock, 858 F.2d at 1524.

Thus, allowing the Alabama Supreme Court's ruling to stand would adversely impact the affordability of manufactured housing to low and moderate income families that Congress desired to preserve.

Given the special interstate nature of the manufactured housing industry and the importance of preserving the uniform inspection system, it is important that the Court look to its prior rulings, that recognized the intent of Congress in maintaining uniformity in similar situations. San Diego Building Trades Council, 359 U.S. at 246-247; Chicago & N.W. Transp. Co., 450 U.S. at 325.

For the foregoing reasons, and for the reasons set forth in the Petition for a Writ of Certiorari, this Court should grant the Petition, and reverse the judgment of the Supreme Court of Alabama in this matter.

Respectfully submitted,



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